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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KARAPET DAVTYAN and MANVEL DAVTYAN, Defendants and Appellants.	B168441 (Los Angeles County Super. Ct. No. BA230474)

APPEALS from judgments of the Superior Court of Los Angeles County, William Fahey, Judge. Affirmed.

Octavio Lopez for Defendant and Appellant Karapet Davtyan.

Vincent James Oliver for Defendant and Appellant Manvel Davtyan.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, William T. Harter and Robert F. Katz, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendants and appellants Manvel Davtyan and Karapet Davytan[1] appeal a judgment convicting them of: (1) conspiracy to commit kidnapping for ransom; (2) attempted kidnapping for ransom; (3) solicitation to commit the crime of kidnapping (as to Karapet only); and (4) assault with a semiautomatic firearm. The trial court sentenced each defendant to life in prison with the possibility of parole, plus a consecutive nine-year term on the firearm conviction.

Defendants claim the judgments are not supported by substantial evidence and that the sentence was cruel and unusual in violation of the Eighth Amendment to the United States Constitution. In addition, Karapet asserts that the trial court prejudicially erred by admitting hearsay evidence relating to alleged prior bad acts. We affirm.

STATEMENT OF THE CASE

Following a preliminary examination, the People filed an amended information charging three counts against both defendants: count one – conspiracy to commit kidnapping for ransom (Pen. Code, §§ 182, subd. (a)(1) & 209);[2] count two – attempted kidnapping for ransom (§§ 664, 209, subd. (a)), charged as a serious felony within the meaning of section 1192.7, subdivision (c); and count four – assault with a semiautomatic firearm (§ 245, subd. (b)). As to count two, the People further alleged that in the commission of the crime, a principal was armed with a firearm within the meaning of section 12022, subdivision (a)(1).

The People charged only Karapet with count three: solicitation to commit a crime (§ 653f, subd. (a)), which the People charged as a serious felony within the meaning of section 1192.7, subdivision (c).

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[1] To avoid confusion and for the convenience of the parties and the court, defendants shall be referred to as "Manvel" and "Karapet."

[2] Unless otherwise indicated, all unspecified statutory references are to the California Penal Code.

Defendants pled not guilty and denied the special allegations. Following the presentation of the prosecution and defense cases, the trial court denied Manvel's motion for a judgment of acquittal.

The jury found Manvel guilty on all three counts, and found to be true the count two special allegation that a principal was armed with a firearm. The jury found Karapet guilty on all four counts, and also found to be true the count two firearm special allegation.

The trial court denied defendants' motions for new trial. The trial court sentenced both defendants to life in prison with the possibility of parole on count one, and imposed a consecutive upper term of nine years in state prison on count four. The trial court stayed imposition of sentence on counts two and three. The trial court awarded each defendant 470 days of pre-custody credit. Both defendants filed timely notices of appeal.

STATEMENT OF FACTS

A. *The Prosecution*

James Patlan was released from state prison in October 2001. On January 3, 2002, Patlan, who had had a heroin problem since 1997, checked into the Tarzana Treatment Center. He chose Tarzana because it was away from his home element and away from temptation. Patlan decided to go to the Tarzana Center for two weeks of detox, followed by a four- to six-month program in his home area.

At the treatment center, Patlan met Karapet, whom he called "Gary." Patlan did not know Karapet's last name. Karapet showed Patlan pictures of himself standing next to a BMW and a Mercedes. Patlan was impressed. Patlan asked Karapet what he did for a living. Karapet stated that he was involved in fraud, welfare fraud, credit card fraud, and profiling.[3] Karapet also told Patlan that his brother was involved in the fraud schemes. Patlan expressed interest in Karapet's activities, so that he could make the same kind of money. Karapet agreed.

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[3] The trial court overruled defense counsel's timely objection to this testimony as hearsay.

Karapet then told Patlan that he was looking to put together a "crew" to take a person for ransom money. Patlan did not remember whether Karapet actually used the word "kidnapping." According to Patlan, the word "crew," meant individuals they could trust.

Patlan asked whether Karapet had any weapons, telling Karapet he would not kidnap someone without a weapon. Karapet assured Patlan he could provide a weapon. Patlan also asked how much money they would make. Karapet replied that his own cut would be $200,000 and that Patlan's cut would probably be the same. Karapet also told Patlan that they would target an Armenian, because they do not call the police.

On January 8, 2002, Gina Geraci entered the Tarzana Treatment Center for an alcohol and cocaine problem. Patlan and Geraci discussed a future relationship. Geraci testified at trial that she remembered meeting Karapet at the center and remember being present with Karapet and Patlan on numerous occasions. For instance, on January 14, Geraci was outside in a smoking area with Patlan and Karapet. At that time, Karapet stated that he had a job for Patlan. Geraci testified: "It was about getting some money for grabbing somebody." Geraci heard someone mention receiving $100,000 for the job and that the job would be completed when they were out of detox.

Geraci thought that Karapet was serious, and testified that Patlan appeared to be interested in the job. Geraci overheard another conversation between Patlan and Karapet that same day, which was basically the same as the first.

Geraci testified that on January 15 she heard another conversation between Patlan and Karapet, during which it sounded like plans were being made. At that time, Geraci heard that the intended victim was going to be a man, and that they would try to have a woman lure the victim into a hotel where they could grab him. Jokingly, Geraci volunteered. Karapet, who did not appear to be joking, told Geraci she was not the right type for the job. Patlan confirmed Geraci's testimony that she was present when Patlan and Karapet discussed doing a "job."

Patlan testified he made plans with Karapet to check out and do the anticipated "jobs." Patlan, Karapet and a person named Jilbert checked out of the Tarzana Treatment Center on January 18. Patlan did not notify his parole officer.

Karapet's other brother picked them up in a green Suburban. They went to Karapet's house in Glendale. With Manvel driving, Patlan, Karapet and Jilbert left Karapet's house in a new black four-door Mercedes. They went to Manvel's apartment in Glendale, where a green Chevy Astro van was parked outside.

Using the Astro van, Karapet and Patlan dropped off Jilbert down the street. Karapet and Patlan then went to a drug store, where Karapet purchased syringes. Patlan was surprised because they had said they were not going to get high. Instead, Patlan understood they were going to take care of business first and that would come later.

They returned to Jilbert's apartment. Later, someone arrived with heroin. Jilbert, Karapet and Patlan used the heroin. Manvel was not present.

That Friday evening, Patlan stayed at the 99 Palms Motel in Glendale. Karapet paid for the room. Patlan testified that if he had not agreed to do the job with Karapet he would not have had a reason to stay in Glendale. Patlan did not have any family or friends in Glendale. Karapet also paid for Patlan's second night at the 99 Palms.

Patlan had never been to Glendale prior to leaving the Tarzana Treatment Center. He did not know anything about the intended victim prior to meeting Karapet and Manvel. After they checked out of the treatment center, Karapet described the intended victim to Patlan during one of the trips in the van. Karapet told Patlan that the intended victim was a well-off Armenian baker, who lived in a house in the Hollywood Hills.

The day of Patlan's first visit to the intended victim's business, Manvel, Karapet and Patlan got high on heroin. Karapet told Patlan that they were going to check out the location that evening. That night, Manvel drove Patlan and Jilbert in the black Mercedes. Karapet was not present. Patlan understood that if it looked good they would "do it."

The next night, Patlan, Jilbert, Geraci, Karapet and Manvel used heroin in Patlan's hotel room. That night was the second time that Patlan went to the victim's business.

Patlan and Karapet were in the Astro van, and Manvel was driving the Mercedes. After a discussion with Karapet during which Manvel was present, Patlan understood they were going to get the guy that night. Patlan testified that before leaving the hotel, Manvel placed a 9-millimeter nickel-plated Smith and Wesson handgun, a taser gun, and duct tape on the bed next to Patlan. Patlan understood this as an instruction from Manvel and took the items with him.

On this occasion, Patlan saw the victim's vehicle in the parking lot. Karapet told Patlan to make certain the guy was by himself. Patlan observed the intended victim in his car talking to another person in an adjacent car. Patlan saw the victim drive away. Manvel followed in the Mercedes, with Patlan and Karapet following in the Astro van. Karapet noticed there was someone else in the vehicle and that they should get the guy when he was alone. All three went back to Patlan's motel. Manvel put the gun and taser back into the trunk of the Mercedes.

Around 1:30 or 2:00 p.m., on January 27, Patlan, Gina and Angela (who had also been at the Tarzana Treatment Center), met Karapet at the family grocery. Karapet got in the car and they drove to a drug store, which was closed, so they drove back to the grocery store. Patlan told Karapet that he was strung out. Karapet gave Patlan a Smith and Wesson handgun. Patlan testified that he told Karapet that he wanted the gun because he planned to rob another connection. Karapet told Patlan that they were still going to do the job.

Patlan met Angela's drug connection in San Fernando, and purchased dope. Karapet then called and asked Patlan to meet at the family grocery. Before going to the grocery, Patlan again met the drug connection. At gunpoint, Patlan robbed him of drugs, money and his cell phone. Patlan then went to Karapet's family grocery.

Later that day on January 27, Geraci testified she recalled being at Manvel's apartment. She observed a conversation between Manvel and Patlan. Manvel, Patlan, Karapet and Angela, then had a conversation in the bedroom, which Geraci did not hear.

Geraci also testified that on four prior occasions, Manvel came to the hotel where Patlan and she were staying.

The evening of January 27, Patlan went to Karapet's family grocery store about 8:00 or 9:00 p.m. Manvel was present. Patlan helped rearrange the shelves in the store. Karapet arrived later. Patlan was upset because Karapet's wife and daughter were with Karapet in a Honda SUV, and they had talked the previous night about doing the job that night.

In the parking lot, Karapet told Patlan he was going to Las Vegas after the job, and that he was not going with Patlan. Instead, Patlan was to do the job with Manvel and another person named Gordo. Patlan was upset. Gordo arrived about 30 to 45 minutes after Karapet left.

At 9:30 p.m., Patlan went with Manvel and Gordo in the Astro van to the intended victim's place of business. Manvel was driving. When they parked in front of the business, Manvel and Gordo both asked Patlan whether he still had the gun. Frustrated, Patlan asked them what they were talking about. Manvel responded by telephoning Karapet. Manvel then handed the phone to Patlan. Patlan told Manvel that he still had the gun.

Gordo explained what the intended victim looked like. Manvel agreed with the description. Gordo instructed Patlan to check if it was possible to get him. Patlan got out of the car and stated: "I'll get him, I'll get him, I will." Patlan testified that the plan was for Patlan to force the intended victim into his own car.

As Patlan walked towards a warehouse loading dock, two nicely dressed guys walked past. Patlan looked to see who got into a car. Patlan testified that he was surprised that as he turned around, the smaller guy already had a gun on him. Patlan pulled out his gun, and they got into a shootout. The smaller guy fired numerous rounds at Patlan, who was struck in the leg and almost fell. Patlan believed that when he was struck a second time in the right arm, his gun discharged and struck the man. Patlan did not know that at that time he had wounded the man.

Patlan dropped to the ground as the man continued to fire. After the firing stopped, Patlan got up and ran. The man fired again. Patlan ran and climbed over a barbed wire fence, cutting himself on the upper arm. Patlan did not see the van pull into the driveway to rescue him.

While hanging from the barbed wire fence, Patlan reached up to unhook his foot from the barbed wire fence, he split the middle finger of his right hand wide open. Patlan then took off down the back side, put his gun in his waistband, jumped another fence, and walked behind another business with the gun in his hand. Patlan saw that Manvel and Gordo were not where they were supposed to be.

Patlan was on the verge of panicking. He put the gun under a trash can, dusted himself off, and started walking down the street. Patlan was going to walk back to the family grocery when Gordo and Manvel appeared in a Lexus SUV. They asked about the gun. Patlan stated it was over here, and they said to get it. They drove back to the grocery without the gun. Patlan stated that he had been shot. They told Angela to take Patlan to the hospital. According to Patlan, when Angela asked what they were going to do, they stated they would retaliate.

The victim, Armen Mkrtumyan, testified that on Saturday, January 27, he was working at his warehouse. His brother, Ara, and three employees were present. As Mkrtumyan and his brother were walking down some stairs near a ramp by the loading dock, Mkrtumyan observed a stranger pass him. Ara was 10 feet behind.

As Mkrtumyan tried to open his car door, he turned and saw the stranger from approximately two feet away, point a gun at his head. The stranger did not say anything. The stranger fired one shot. Mkrtumyan, who had a gun in his left pocket, started to shoot. The stranger dropped his gun. Mkrtumyan saw the stranger take another gun, and fire five or six shots as he started to run. Mkrtumyan fired maybe six shots. Mkrtumyan was hit in the left leg below the knee.

Mkrtumyan believed that he hit the stranger in the hand, causing him to drop his gun. Mkrtumyan thought he hit the stranger a second time when the stranger screamed:

"I got shot." When the stranger started to run, Mkrtumyan ran after him. Mkrtumyan lost sight of the stranger. Mkrtumyan testified that he was carrying the gun because of an incident which had occurred on September 19, 2001, another failed kidnapping attempt.

Mkrtumyan went to the police station to report the incident. He told the police about the September 19 incident for the first time that night. The police called an ambulance and took Mkrtumyan to the hospital.

It appeared to Mkrtumyan that the man he had shot was also in the hospital. When Patlan was wheeled past Mkrtumyan's room, Patlan tried to act like he did not recognize him, but Mkrtumyan identified Patlan as the shooter.

Glendale Police Detective William Currie, a member of the robbery homicide detail, was the lead investigator. He went to the Glendale hospital on January 27 and met Mkrtumyan. Detective Currie observed Mkrtumyan point to, and identify, Patlan as the shooter.

That night, Detective Currie spoke with Patlan. At first, Patlan thought Karapet would help him out, and did not tell Currie what had happened. Later, at the Glendale police station, Currie told Patlan that Karapet denied knowing Patlan.

Eventually, Patlan told Detective Currie what had happened. Currie told Patlan that he would try to get Patlan a deal with the district attorney, if Patlan cooperated. According to Patlan, Currie made no promises.

On the night of January 27, at the location of Mkrtumyan's business in Glendale, the police recovered a number of 25 caliber casings, 25 caliber bullets, and a one 9-millimeter casing. Based upon information from Detective Currie, two Glendale police officers recovered a 9-millimeter Smith & Wesson semiautomatic pistol next to a dumpster near a trash can. Inside the magazine were five live 9-millimeter rounds and inside the barrel was a 9-millimeter hollow-point round.

Pursuant to a search warrant, on April 18, 2002, Glendale police officers searched Karapet's bedroom. They seized a taser gun from the dresser drawer.

Also on April 18, 2002, the police interviewed Manvel, with Officer Tigran Topadzhikyan serving as an Armenian interpreter. Manvel asked why the police wanted to speak with him. Detective Currie showed Manvel a photograph of Patlan. Manvel denied knowing Patlan.

Detective Currie concluded that Patlan had fired only one round. Currie also concluded that the firearm used by Mkrtumyan was consistent with the 25-caliber ammunition found at the scene. Detective Currie testified that Mkrtumyan fired at least three rounds, but no more than five. Detective Currie could not determine who fired first.

On March 20, Patlan signed a letter stating that no promises had been made to him. At the time of his testimony, Patlan had entered a guilty plea and agreed to a term of 14 years. According to Patlan, he understood that if he was convicted, he could receive a double life sentence. Patlan knew that if he cooperated he might receive some leniency. Patlan understood he was required to testify in court and that if he failed to tell the truth, the 14-year sentence could change.

B. *The Defense*

This appeal involves the issue of whether the People presented sufficient evidence to sustain defendants' convictions. This appeal also involves the issue of whether there was sufficient evidence in the record to corroborate the accomplice testimony of James Patlan. Therefore, we set forth only a limited portion of the defense case.

Karapet testified that in January 2002, he checked into the Tarzana Treatment Center after admitting to his parole officer that he was using drugs. Karapet had been a patient there two or three times in the past. While undergoing detox, Karapet met Patlan.

Karapet offered to help Patlan and find him a job in a restaurant. Patlan did not agree to work for one of Karapet's friends, and stated he wanted to make fast money. Patlan expressed an interest in doing illegal things with Karapet. Karapet responded that he knew some guys who could get credit cards. Patlan wanted to meet these people.

Karapet denied any conversations with Patlan at the Treatment Center about snatching or kidnapping people. Karapet also denied that he had any conversations with

Patlan while Gina Geraci was present that involved using a woman to lure a person into a room.

Karapet testified he checked out of the Treatment Center on January 18. Patlan left with Karapet to meet the guy who could supply the credit cards. Karapet denied ever driving Patlan to the victim's location, and denied ever seeing the victim, Mkrtumyan, prior to his preliminary hearing. Karapet also denied that he ever gave any guns to Patlan or that he had any discussion with Patlan about kidnapping people for ransom.

Karapet testified that he purchased the taser gun for his wife's protection.

According to Karapet, on January 27, Karapet did not give Patlan a gun. Karapet wanted Patlan out of his life. He met with Patlan at the family store to tell him he was leaving for Las Vegas and Patlan had no reason to stay there. Karapet did not recall a telephone conversation that evening in which he spoke to Patlan about a gun.

Patlan testified that he was bleeding from four places when he entered the Lexus after the failed kidnapping attempt. On April 25, 2002, a Los Angeles County Sheriff's Department criminalist examined a gray Lexus SUV for purposes of detecting blood. No visible blood stains were observed. The seat belt and two other items tested negatively for blood.

CONTENTIONS

Defendant Manvel contends that the trial court erred by denying his motion for judgment of acquittal following presentation of the evidence.

Defendant Karapet contends that: (1) the trial court erred by denying his motion to dismiss count two for attempted kidnapping for ransom on the basis of insufficient evidence; (2) the trial court erred by denying his motion for new trial based upon the improper use of accomplice testimony; and (3) the trial court erred by admitting hearsay testimony relating to alleged prior bad acts.

Finally, both defendants contend that the sentences imposed constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

DISCUSSION

A. *Defendant Manvel Davytan*

Defendant Manvel was charged with, and convicted of: (1) conspiracy to commit kidnapping for ransom; (2) attempted kidnapping for ransom; and (3) assault with a semiautomatic firearm. Manvel claims that there was a lack of substantial evidence connecting Manvel to the conspiracy. Manvel also claims the convictions were impermissibly based solely upon accomplice (*i.e.*, Patlan's) testimony in violation of section 1111.[4] We disagree with Manvel's contentions.

1. *Standard of Review*

We review for substantial evidence.[5] "Further, we must view the evidence in the light most favorable to the People and presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence." (*People v. Bloyd* (1987) 43 Cal.3d 333, 346-347.)

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[4] Section 1111 provides: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. [¶] An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

[5] In *People v. Johnson* (1980) 26 Cal.3d 557, the Supreme Court explained: "We think it sufficient to reaffirm the basic principles which govern judicial review of a criminal conviction challenged as lacking evidentiary support: the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence–that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Id*. at p. 578; *People v. Marshall* (1997) 15 Cal.4th 1, 31.) Stated another way, "[t]he test on appeal for determining if substantial evidence supports a conviction is whether ' "a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt." ' " (*People v. Iniguez* (1994) 7 Cal.4th 847, 854.)

2. *Analysis*

In *People v. Morante* (1999) 20 Cal.4th 403, the Supreme Court explained: "Pursuant to section 182, subdivision (a)(1), a conspiracy consists of two or more persons conspiring to commit any crime. A conviction of conspiracy requires proof that the defendant and another person had . . . the specific intent to commit the elements of that offense, together with proof of the commission of an overt act 'by one or more of the parties to such agreement' in furtherance of the conspiracy." (20 Cal.4th at p. 416, fn. omitted.)[6]

Direct evidence of an agreement is not necessary to support a conviction. In *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, the court explained: "Circumstantial evidence often is the only means to prove conspiracy. [Citations.] There is no need to show that the parties met and expressly agreed to commit a crime in order to prove a conspiracy. The evidence is sufficient if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. [Citation.] The inference can arise from the actions of the parties, as they bear on the common design, before, during, and after the alleged conspiracy. [Citation.]" (*Id*. at p. 999; see also *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1135 [" 'The existence of a conspiracy may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy.' "].) Finally, "[t]he existence of a conspiracy may be proved by uncorroborated accomplice testimony; corroboration of accomplice testimony

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6 See also *People v. Swain* (1996) 12 Cal.4th 593, 600 ["The crime of conspiracy is defined in the Penal Code as 'two or more persons conspir[ing]' '[t]o commit any crime,' together with proof of the commission of an overt act 'by one or more of the parties to such agreement' in furtherance thereof. [Citation.] 'Conspiracy is a "specific intent" crime. . . . The specific intent required divides logically into two elements: (a) the intent to agree, or conspire, and (b) the intent to commit the offense which is the object of the conspiracy. . . . To sustain a conviction for conspiracy to commit a particular offense, the prosecution must show not only that the conspirators intended to agree but also that they intended to commit the elements of that offense.' " (Italics omitted.)

is needed only to connect the defendant to the conspiracy." (*People v. Price* (1991) 1 Cal.4th 324, 444.)

Pursuant to the foregoing authorities, the record presents substantial evidence supporting Manvel's convictions. Moreover, the record presents sufficient corroborating evidence connecting Manvel to the commission of the underlying offense, such that his convictions do not violate section 1111.

After Karapet and Patlan checked out of the Tarzana Treatment Center on a Friday, Patlan met Manvel, and traveled to Manvel's apartment. Soon after, Patlan, Manvel and Karapet used heroin. That night, the first time that the conspirators traveled to the location of the planned kidnapping, Manvel acted as the driver. After driving around the location a few times, Manvel told Patlan to see if it was possible to get the victim that night. When Patlan asked what the victim looked like, Manvel told Patlan that he would be driving a black Mercedes SUV.

The next night, Patlan, Jilbert, Geraci, Karapet and Manvel used heroin in Patlan's hotel room. On this occasion, Manvel brought along a 9-millimeter nickel-plated Smith and Wesson handgun and a taser gun, and laid them on the bed next to Patlan. Patlan testified he perceived this as Manvel giving him a form of instruction. Manvel also had a role of duct tape.

According to Patlan, while Karapet did most of the talking, Manvel was present as they planned the kidnapping during the week.

On a third visit to the victim's location, Karapet and Patlan drove in the Astro van, and Manvel followed them in the Mercedes. After arriving, Karapet and Patlan walked down one side of the street, while Manvel walked down the other side. They then got back into the respective cars.

After the victim drove away, both cars followed, with Manvel leading in the Mercedes. They all went back to Patlan's hotel. At that point, Manvel put the gun and the taser in the back of the Mercedes.

On January 27, Geraci testified that she was at Manvel's apartment and heard conversations between Patlan and Manvel. That evening, Manvel drove Patlan and Gordo to the location. Manvel confirmed Gordo's explanation to Patlan as to what the intended victim looked like. Manvel was present while Gordo told Patlan to see if he could get the guy and when he told Patlan to put the victim in the victim's car.

After the attempted kidnapping and shootout, Manvel picked up Patlan in a Lexus SUV. Manvel asked Patlan where the gun was, and instructed Angela to take Patlan to the hospital.

This constitutes substantial evidence that defendant Manvel knew and actively participated in the planning and commission of the attempted kidnapping. This evidence also constitutes substantial evidence that Manvel knowingly and intentionally armed Patlan with a semiautomatic weapon. Moreover, pursuant to *In re Nathaniel C.*, *supra*, 228 Cal.App.3d 990, at the very least, this evidence supports the inference that the parties positively came to a mutual understanding to commit the crime of kidnapping with a semiautomatic weapon. (*Id.* at p. 999.)

Defendant Manvel asserts, however, that the foregoing evidence was based entirely upon the accomplice testimony of James Patlan in violation of section 1111, quoted above in footnote 4. We disagree.

We first set forth the law regarding what amount of corroborating evidence is sufficient to sustain a conviction based primarily upon accomplice testimony. In this regard, neither party contests the fact that Patlan was an accomplice.

The requisite corroboration must connect the defendant with the commission of the offense. The corroborating evidence may be circumstantial, slight and entitled to little consideration when standing alone. It is not required that the corroborating evidence be sufficient in itself to establish every element of the offense charged. The corroborating evidence is sufficient if it substantiates enough of the accomplice's testimony to establish his credibility. (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1128.)

"False and contradictory statements of a defendant in relation to the charge are themselves corroborative evidence." (*People v. Santo* (1954) 43 Cal.2d 319, 327.)

In this case, Manvel made a false statement in relation to the charge. When Detective Currie interviewed Manvel on April 18, 2002 and showed him a photograph of Patlan, Manvel denied that he ever knew who Patlan was. This directly conflicts with Gina Geraci's testimony, who observed Patlan and Manvel together on numerous occasions, including the day of the attempted kidnapping in Manvel's apartment. The jury was free to conclude that this type of false statement indicated a consciousness of guilt and connected Manvel to the crimes charges. (*People v. Santo*, *supra*, 43 Cal.2d at p. 327.)

In addition, shortly before the attempted kidnapping, Patlan denied that he had the gun given to him by Manvel. In response, Patlan testified that Manvel telephoned Karapet to deal with Patlan's denial about possessing the gun. Patlan further testified that Manvel put Patlan on the line with Karapet. After speaking with Karapet, Patlan told Manvel and Gordo that he had the gun.

The trial court admitted into evidence a phone bill for the evening in question.[7] The phone bill was in the name of Marina Davtyan, Manvel's wife. The phone bill corroborates Patlan's testimony that Manvel telephoned Karapet around the time in question. Exhibit No. 17 shows that on January 27, at 9:18 p.m., the approximate time of the kidnapping, someone placed a call to Karapet's cell phone.

Following the call to Karapet, the phone bill showed an approximate one-hour gap in use from around 9:18 p.m. until 10:09 p.m. This gap was followed by approximately 17 calls between 10:09 p.m. and 10:47 p.m. after the failed kidnapping attempt.

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[7] Because People's Exhibit No. 17 was not included in the record on appeal, this court, on its own motion, augmented the record by requesting Exhibit No. 17 from the superior court.

In conclusion, pursuant to the foregoing authorities, this evidence was sufficient to corroborate Patlan's testimony and to connect Manvel to the crimes for which he was convicted. Thus, the trial court did not err by denying Manvel's motion for judgment of acquittal and Manvel's later motion for new trial.

B. *Defendant Karapet Davtyan*

Karapet asserts that the trial court erred by denying his motion to dismiss the second count – attempted kidnapping for ransom. Karapet also claims the trial court erred by denying his motion for new trial based upon the alleged improper use of accomplice testimony.

1. *Standard of Review*

We review for substantial evidence. See section A(1) of the Discussion.

2. *Analysis*

a. *Attempted Kidnapping*

Pursuant to sections 209, subdivision (a) and 664, to convict a person of attempted kidnapping, the People must show that the defendant attempted, but failed to seize, confine, or abduct another person by any means, in order to gain ransom.

Karapet's primary contention is that the evidence shows nothing more than the acts of drugs' users, driving around trying to procure drugs. Karapet claims he did nothing more than pay for a motel room, give Patlan a firearm, and drive around with him. Karapet asserts that he was not even present on the evening of the kidnapping. Karapet also appears to suggest that he withdrew from the conspiracy to kidnap Mkrtumyan.

Karapet simply ignores substantial evidence that he formed the conspiracy with Patlan and Manvel to kidnap Mkrtumyan. Karapet paid for Patlan's hotel room. Karapet took Patlan to the spot where the kidnapping was to occur. Karapet encouraged Patlan by telling him the guy would be an easy target and that Armenians do not call the police.

The fact that Karapet did not participate in every overt act and was not present on the evening in question does not change the analysis. Physical presence and participation

in the overt acts are not required to find someone guilty of a conspiracy. (*People v. Morante* (1999) 20 Cal.4th 403, 417.) A co-conspirator is liable for the acts of a confederate which are the natural and probable consequences of the purpose of the conspiracy. (*People v. Garcia* (2000) 84 Cal.App.4th 316, 325.)

In addition, the jury was free to conclude that Karapet did not withdraw from the conspiracy. On the day in question, Karapet came to the family store with his wife and daughter and told Patlan that he was going to Las Vegas until after they did the job. Karapet later told Patlan that he (Patlan) was going to do the job with Manvel and Gordo. This indicates that while Karapet planned and directed the kidnapping, he was not going to be an actual participant in the crime.

b. *Corroboration of Accomplice Testimony*

Pursuant to the authorities set forth in section A(2) of the Discussion, *ante*, the record presents sufficient evidence corroborating the accomplice testimony of Patlan to connect Karapet to the crimes for which he was convicted.

The telephone records corroborate Patlan's testimony that Manvel called Karapet just before the kidnapping after which Patlan informed Manvel and Gordo that he did have the gun given to him by Manvel.

In addition, Gina Geraci was present and overheard conversations between Karapet and Patlan at the treatment center to the effect that Karapet and Patlan were going to grab someone for money. In Geraci's presence, they even discussed using a woman to lure the intended victim into a motel room. Geraci also testified that after she checked out of the treatment center, she overheard conversations between Karapet and Patlan regarding the planning of the kidnapping. She observed Karapet hand Patlan a gun.

The trial court did not err by denying Karapet's motion to dismiss the second count or by denying Karapet's motion for new trial.

C. *Prior Bad Acts*

Defendant Karapet asserts the trial court abused its discretion by admitting hearsay evidence regarding alleged prior acts of welfare fraud, credit card fraud and profiling. We disagree.

1. *Standard of Review*

We review for abuse of discretion the admission into evidence of other alleged bad acts. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1239, overruled on another point in *People v. Edwards* (1991) 54 Cal.3d 787, 835.)

In *People v. Ewoldt* (1994) 7 Cal.4th 380, the Supreme Court explained: "Our conclusion that section 1101 does not require exclusion of the evidence of defendant's uncharged misconduct, because that evidence is relevant to prove a relevant fact other than defendant's criminal disposition, does not end our inquiry. Evidence of uncharged offenses 'is so prejudicial that its admission requires extremely careful analysis. [Citations.]' . . . 'Since "substantial prejudicial effect [is] inherent in [such] evidence," uncharged offenses are admissible only if they have substantial probative value.' [Citation.] [¶] Although the evidence of defendant's uncharged criminal conduct in this case is relevant to establish a common design or plan, to be admissible such evidence 'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352. [Citations.]' . . . We thus proceed to examine whether the probative value of the evidence of defendant's uncharged offenses is 'substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' (Evid. Code, § 352.)" (7 Cal.4th at p. 404, italics omitted; see also *People v. Brown* (1993) 17 Cal.App.4th 1389, 1395 [" '[B]ecause other-crimes evidence is so inherently prejudicial, its relevancy is to be "examined with care." It is to be received with "extreme caution," and all doubts about its connection to the crime charged must be resolved in the accused's favor.' "].)

2. *Analysis*

While testifying, Patlan presented hearsay evidence that Karapet told Patlan he made his money by engaging in welfare fraud, credit card fraud and profiling. Defendant objected to this evidence as hearsay.

Karapet claims this testimony was inadmissible under Evidence Code section 1101.[8] Karapet also claims that the alleged prior acts were not sufficiently presented to allow a jury to believe the acts had been committed. Finally, Karapet asserts that the prejudicial effect of this evidence outweighed any probative value such testimony may have had. We reject defendant's arguments.

Pursuant to Evidence Code section 1101, subdivision (b), such hearsay evidence is admissible to show motive, opportunity, intent, preparation, plan, knowledge, and identity of absence of mistake.

This fraud-related testimony was relevant to show motive and state of mind of Patlan and defendant Karapet in this case, and was therefore admissible under Evidence Code section 1101, subdivision (b). This evidence establishes that Patlan and Karapet were motivated to enter a criminal conspiracy to make money, the kind of money that Karapet had been making in his other criminal enterprises.

As to defendant's second contention that the alleged acts were not sufficiently presented to the jury, defendant cites no authority for this proposition. In any event, the weight to be given this evidence was a matter for the jury.

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[8] Evidence Code section 1101 provides in pertinent part: "(a) [E]vidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, . . .) other than his or her disposition to commit such an act."

Finally, defendant claims this evidence was more prejudicial than probative under Evidence Code section 352.[9] We disagree. First, defendant waived this argument by failing to object below on these specific grounds. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1014-1015 ["Although counsel's lack of express reference to Evidence Code section 352 is not itself fatal to defendant's claim, the stated basis of the objection was insufficient to alert the trial court that this provision was being invoked."].)

Second, the evidence in question was brief, non-specific, and vague. Defendant makes no assertion that the prosecutor reiterated this evidence in either the opening statement or closing argument. The trial court did not abuse its discretion by impliedly concluding that the probative value of this single reference to fraud and profiling was not outweighed by any alleged prejudicial effect.

To the extent that admission of this testimony was erroneous, any such error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

D. *Sentencing*

Both defendants claim the sentences imposed constitute cruel and unusual punishment under the Eighth Amendment to the United States Constitution. We disagree.

1. *Standard of Review*

In *People v. Martinez* (1999) 76 Cal.App.4th 489, 496, the Court of Appeal explained: "Whether a punishment is cruel or unusual is a question of law for the appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment."

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[9] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

2. *Analysis*

Defendants present two rationales in support of their position that the sentences imposed violate the Eighth Amendment: (1) the sentences were excessive because they were not proportionate to the 14-year sentence received by Patlan pursuant to his plea agreement; and (2) section 245, subdivision (b), governing assault with a semiautomatic weapon, contains no sentencing guidance, thus allowing unequal sentences for unequal crimes.

Although given the opportunity,[10] neither defendant raised either of these objections before the trial court. Both are therefore waived.

In *People v. Kelley* (1997) 52 Cal.App.4th 568, the defendant asserted that his nine-year stalking sentence constituted cruel and unusual punishment on the basis that the punishment was grossly disproportionate to his level of culpability. (*Id*. at p. 583.) The court concluded that because the defendant failed to raise the issue below it was waived. (*Ibid*; see also *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.)

As the second issue, section 245, subdivision (b),[11] contains no guidance for the trial court, allowing the trial court to exercise its discretion as to whether to impose a three, six or nine-year term. Neither defendant raised any issue before the trial court that section 245, subdivision (b), was infirm for its failure to provide trial courts with guidance in choosing a term of imprisonment. Therefore, this argument is waived.

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[10] The jury returned its verdict on February 19, 2003. The People filed a sentencing memorandum on March 17, 2003, seeking a greater aggregate sentence than that imposed ultimately by the trial court. Defendants both filed sentencing memorandums on April 22, 2003, both of which indicate that defendants were well aware of the potential sentencing options available to the trial court. The sentencing hearing occurred on May 23, 2003. Defendants had ample opportunity to raise these issues before the trial court.

[11] Section 245, subdivision (b), provides: "Any person who commits an assault upon the person of another with a semiautomatic firearm shall be punished by imprisonment in the state prison for three, six, or nine years."

(*People v. Scott* (1994) 9 Cal.4th 331, 353 ["We conclude that the waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices."].)

Absent waiver, defendants have failed to show that the sentences imposed violated the Eighth Amendment. In *People v. Kelley*, *supra*, 52 Cal.App.4th 568, the court explained: "Successful challenges based on proportionality are extremely rare. [Citation.] The defendant must show the sentence is ' "out of all proportion to the offense" ' and that it offends 'fundamental notions of human dignity.' " (*Id*. at p. 583; see also *Ewing v. California* (2003) 538 U.S. 11, 21-23; *Lockyer v. Andrade* (2003) 538 U.S. 63.)

Defendants have failed to show that the sentence is out of proportion to the crimes for which they were convicted. In *Ewing v. California, supra,* 538 U.S. 11, the United States Supreme Court reviewed and summarized a number of cases dealing with this issue. In *Ewing*, the defendant had prior felony convictions for burglary and robbery. After stealing less than $400 worth of golf clubs, the trial court sentenced the defendant to a prison term of 25 years to life. The Supreme Court affirmed the sentence.

The *Ewing* court explained that it did not violate the Eighth Amendment to sentence a three-time offender to life in prison with the possibility of parole for three theft-related offenses each involving less than $200. (*Ewing v. California*, *supra*, 538 U.S. at pp. 21-22, see *Rummel v. Estelle* (1980) 445 U.S. 263.)

Pursuant to the foregoing authority, the sentences imposed upon defendants are not grossly disproportionate to the crimes of conspiracy to commit kidnapping for ransom and assault with a semiautomatic firearm.

We also reject defendants' argument that the sentences are grossly disproportionate to the sentence received by Patlan, who actually pulled the trigger and inflicted the injuries upon the victim. Defendants have provided no authority in which a court held that a defendant's sentence after trial must be related or proportionate to the sentence of an accomplice who accepts a plea agreement before trial. In *Corbitt v. New*

Jersey (1978) 439 U.S. 212, the Supreme Court reiterated: "We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea. The plea may obtain for the defendant 'the possibility or certainty . . . [not only of] a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty . . . ,' [citation], but also of a lesser penalty than that *required* to be imposed after a guilty verdict by a jury." (*Id*. at pp. 219-220, italics in original, fn. omitted.)

Moreover, defendants complain that at the most, all Manvel did was drive Patlan to the crime scene and that Karapet was not even present. Defendants, however, ignore the important facts that they planned the kidnapping, identified the victim, and provided Patlan with the necessary tools (the weapon) to carry out a felony offense in which three people (Patlan, Mkrtumyan, and his brother) could have been killed.[12]

Defendants also assert that section 245, subdivision (b), is unconstitutional because, without guidance, trial courts could impose unequal sentences for the commission of the same crime. We reject this argument. There is no evidence that the trial court imposed unequal sentences for equal crimes. Both defendants received the upper term of nine years for violation of section 245, subdivision (b).

Moreover, pursuant to *Corbitt v. New Jersey, supra,* 439 U.S. 212, the People were free to negotiate a lesser sentence with Patlan. The fact that the People negotiated a deal with Patlan does not impact the analysis as to whether section 245, subdivision (b) is constitutionally infirm because it does not contain sentencing guidance. Finally, trial courts are given substantial sentencing guidance in the California Rules of Court, rule 4.401 et seq.

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[12] At the sentencing hearing, the trial court explained: "I think clearly Karapet Davtyan and maybe to a slightly lesser extent Manvel Davtyan relied on a fairly volatile and dangerous person in Mr. Patl[a]n for several reasons: [¶] One, to insulate themselves from possible apprehension in this kidnapping scheme, but also because they thought that Patl[a]n would go forward and accomplish this scheme. And by arming Patl[a]n with a weapon, I think that really did increase the seriousness of the case . . . ."

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P.J.

ALDRICH, J.